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Supreme Court, U.S.
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No. 98-6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

EL PASO NATURAL GAS COMPANY, CYPRUS FOOTE MINERAL COMPANY, AND CYPRUS AMAX MINERALS COMPANY,

PETITIONERS,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

RESPONDENTS.

On A Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Where non-Indians have been sued in tribal court solely under tribal law causes of action that have been preempted by federal law, must those parties exhaust all tribal remedies before a federal court may consider the preemption issue?

2. Where a tribal court asserts adjudicatory jurisdiction against non-Indians involving a subject over which the tribe has no regulatory jurisdiction, must those parties exhaust all tribal remedies before seeking relief in federal court?

3. Did the court of appeals improperly reverse, *sua sponte*, an injunction from which the enjoined parties had not appealed?

PARTIES TO THE PROCEEDING

All the parties in the court of appeals are identified in the caption.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Rule 29.6 statement in the petition for writ of certiorari is incorporated herein by reference for petitioners Cyprus Foote Mineral Company and Cyprus Amax Minerals Company.

As for El Paso Natural Gas Company, El Paso Energy Corporation became the parent of that petitioner on August 1, 1998. El Paso Natural Gas Company's non-wholly owned subsidiaries currently include:

Aguaytia Energy L.L.C.
Bear Creek Storage Company
Berkshire Feedline Acquisition L.P.
Berkshire Power Company L.L.C.
Border Gas Inc.
CAPEX S.A.
Central Costanera, S.A.
Central Termoelectrica Buenos Aires, S.A.
Compania Samalayuca II, S.A. de C.V.
Companias Asociadas Petroleraos S.A.
Cornerstone/Merit Joint Venture
Coyote Gas Treating Limited Liability Company
Cross Country Development L.L.C.

Delos Offshore Company, L.L.C.
ECK Generating s.r.o.
El Paso Amazonas Energia Ltda.
El Paso Energy Argentina Limitada S.A.
El Paso Pakistan Power (Private) Limited
El Paso Rio Claro Ltda.
El Paso Rio Grande Ltda.
EMA Power Kft.
Energeticke Centrum Kladno s.r.o.
Energy Equity EPIC (Sengkang) Pty. Limited
EPIC Energy Amazon Company
Epic Energy Australia Trust
Epic Energy (Australia) Nominees Pty. Ltd.
Epic Energy Pty. Limited
EPIC Gas Transportes S.A.
Ewing Bank Gathering Company, L.L.C.
Fauji Kabirwala Power Company Limited
Flextrend Development Company, L.L.C.
Garvin County Pipeline
Gas de Chile S.A.
Gasoducto Transandino Argentina S.A.
Gasoducto Transandino S.A.
Gasoductos de Chihuahua, S. de R.L. de C.V.
Green Canyon Pipe Line Company, L.L.C.
Gulf Processing Partners
High Island Offshore System
Interenergy Company
Inversiones EPEC Gas (Chile) Ltda.
KEI Energy Private Ltd.
Latin America Capital L.L.C.
Leviathan Gas Pipeline Partners, L.P.
Leviathan Oil Transport Systems, L.L.C.

Manta Ray Gathering Company, L.L.C.
Manta Ray Offshore Gathering Company, L.L.C.
MASSPOWER
Matra Powerplant Holding B.V.
Mountain Creek Joint Venture
Nautilus Pipeline Company, L.L.C.
Neptune Pipeline Company, L.L.C.
Oasis Pipe Line Company
Ocean Breeze Pipeline Company, L.L.C.
Orange Cogeneration GP II, Inc.
Orange Cogeneration Limited Partnership
Pasotronica, S.A. de C.V.
Polk Power GP II, Inc.
Polk Power Partners, L.P.
Portland Natural Gas Transmission System
Poseidon Oil Pipeline Company, L.L.C.
Poseidon Pipeline Company, L.L.C.
PT Energi Sengkang
Sailfish Pipeline Company, L.L.C.
SAM II Equity Funding, L.L.C.
Samalayuca Holding Partnership
Samalayuca II Management L.L.C.
Samalayuca II Management, S. de R.L. de C.V.
Servicios El Paso, S.R.L.
Stingray Holding, L.L.C.
Stingray Pipeline Company
Sulawesi Energy Pty. Limited
Tarpon Transmission Company
Tembec Company
Texam Offshore Gas Transmission, L.L.C.
The Maple Gas Development Corporation
The Western Market Center Joint Venture

Transco Hydrocarbons Company, L.L.C.
Transco Offshore Pipeline Company, L.L.C.
Triunion Energy Company
U-T Offshore System (Delaware GP)
VEN Field Services Company
VK Deepwater Gathering Company, L.L.C.
VK-Main Pass Gathering Company, L.L.C.
Weilkopolska Energia, S.A.
West Cameron Dehydration Company, L.L.C.

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OPINIONS BELOW

The opinion of the court of appeals, as amended (App. 74a-96a), is reported at 136 F.3d 610. The order of the court of appeals amending its opinion, denying the petitions for rehearing en banc, and rejecting the suggestions for rehearing en banc (App. 97a-99a) is not separately reported. The decisions of the district court (App. 68a-73a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1998. Petitions for rehearing and suggestions for rehearing en banc were denied April 27, 1998. The petition for a writ of certiorari was filed June 26, 1998, and was granted on October 13, 1998. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Atomic Energy Act, as amended by the Price-Anderson Act and the Price-Anderson Amendments Act, 42 U.S.C. §§ 2012-2014, 2210, are set forth in the appendix to the petition for writ of certiorari (Pet. App. 34a-45a).

STATEMENT

A. *El Paso v. Neztsosie* -- Tribal and Federal District Court Proceedings

For several years beginning in 1956, El Paso Natural Gas Company (El Paso) conducted uranium mining on land located within the Navajo reservation in northeastern Arizona.[1] El Paso conducted these activities pursuant to federal mining permits, leases supervised by the Bureau of Indian Affairs, and a contract with the Atomic Energy Commission (AEC) and subject to the provisions of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. §§ 2011-2297g-4. The AEC purchased El Paso's entire uranium production under the government's Domestic Uranium Program, 10 C.F.R. pt. 60 (1949 & 1958 supp.).

In April 1995, more than thirty years after the mining operations had terminated and El Paso had surrendered its leases, Laura and Arlinda Neztsosie filed suit against El Paso in Navajo tribal court.[2] The Neztsosies, members of the Navajo Nation, claimed personal injuries allegedly arising from radioactive contamination of water, air, and soil in the vicinity of El Paso's former operations. This contamination, they alleged, was caused by wastes that purportedly contained high concentrations of uranium, plutonium, thorium, and other

[1]The mining operations were in fact conducted by a former wholly-owned subsidiary of El Paso, but for convenience we refer to the parent company.

[2]The Navajo Nation Code currently provides for civil jurisdiction over any person, whether a tribal member or non-Indian, who "has caused an action to occur within the territorial jurisdiction of the Navajo Nation." 7 N.N.C. § 253(2). At the time of petitioners' operations within the reservation, however, the Navajo Nation did not claim adjudicatory jurisdiction over non-members. Such claims date from a tribal council resolution adopted in 1980, long after petitioners' mining and milling operations had ceased. Resolution CF-19-80 (Feb. 13, 1980); *see UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046, 1049 (D. Ariz. 1981).

radioactive materials.

The Neztsosies alleged claims based solely on Navajo common law, including negligence, strict liability for an "abnormally dangerous activity," and "outrageous conduct." Both compensatory and punitive damages were sought. (App. 18a-27a) The Neztsosies did not plead any claims under the Price-Anderson Amendments Act, which -- as discussed below (pp. 16-19) -- is part of the AEA and provides an exclusive federal-law remedy for nuclear-related torts. 42 U.S.C. §§ 2014(hh) & 2210.

Believing tribal jurisdiction to be precluded by federal law, El Paso filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Arizona. (App. 11a-17a) El Paso's complaint, and a subsequent motion for a preliminary injunction, recited that El Paso's mines had operated under AEC contract and supervision and that the Price-Anderson Amendments Act established the exclusive remedy for the Neztsosies' personal injury claims. Thus, El Paso argued, the Neztsosies' tribal law claims were preempted by federal law and the tribal court lacked subject matter jurisdiction.

The district court (Hon. Roger G. Strand) granted in part and denied in part El Paso's motion for an injunction. The court acknowledged that "the United States has a very strong and compelling interest to assure that it operates its nuclear industry in all of its varying facets in a manner that is uniformly appropriate for all," but stated that the presence of tribal governments within the United States "compounds this problem" and results in a "mix of complexity." (App. 69a-70a) The district court decided to resolve this "complexity" by allowing the tribal court to hear the Neztsosies' claims based on tribal law while enjoining the Neztsosies from asserting in tribal court any claims under Price-Anderson. The court declined to decide whether the tribal law claims had been preempted by Price-Anderson. (App. 71a)

Subsequently, in tribal court, the Navajo tribal judge denied El Paso's motion to dismiss the Neztsosies' complaint

on the basis of federal preemption. Characterizing El Paso's preemption defense as a "bootstrap argument," the tribal court observed that "Plaintiff's complaint cites Navajo common law, and not the [Price-Anderson] Act, as its authority."[3] The tribal court thus concluded that "the Price-Anderson Act has no application to this case" (*id.* at 13) and that the Neztsosies' claims could proceed.

B. *Cyprus v. Richards* -- Tribal and Federal District Court Proceedings

The suit involving Cyprus Foote Mineral Company and Cyprus Amax Minerals Company (collectively "Cyprus") is similar in nature to the El Paso suit. Cyprus is successor to a company that, in the late 1950s and early 1960s, conducted federally-regulated and -licensed uranium mining and milling operations on the Navajo reservation. Zonnie Richards, a member of the Navajo Nation, sued Cyprus in tribal court, individually and as representative of her husband's estate, alleging wrongful death and personal injuries as a result of radioactive contamination from tailings and wastes from mine and mill sites of Cyprus and others. Ms. Richards' claims were based entirely upon tribal law, including negligence, strict liability for "ultra hazardous" activities, and "outrageous conduct." (App. 39a-60a) Exemplary as well as compensatory damages were sought. Price-Anderson was not mentioned in Ms. Richards' complaint, and the tribal court denied Cyprus' motion to dismiss the complaint on the basis of Price-Anderson preemption. (App. 61a-67a)

Cyprus then counter-sued in Arizona federal court, and the result was another partial injunction by District Judge Strand, similar to the El Paso partial injunction -- *i.e.*, Ms. Richards was permitted to prosecute her tribal law claims in

[3]Order Denying Defendant's Motions To Dismiss, No. TC-CV-0052-95, at 4 (D.C. Navajo Nation Judicial District of Tuba City, Arizona, Oct. 9, 1996). Copies of this opinion, and other selective excerpts from the tribal court proceedings, will be lodged with the Clerk.

tribal court, but was enjoined against pursuing any Price-Anderson claims in that forum. (App. 72a-73a)

C. The Court of Appeals

El Paso and Cyprus filed appeals, which were consolidated, to the United States Court of Appeals for the Ninth Circuit, seeking review of the district court orders refusing to enjoin prosecution of the tribal claims in Navajo tribal court. Importantly, neither the Neztsosies nor Ms. Richards cross-appealed the district court's injunctions that precluded them from initiating any Price-Anderson claims in tribal court.

A divided panel of the Ninth Circuit affirmed the district court's refusal to enjoin prosecution of tribal law claims and, *sua sponte*, reversed the injunctions against the assertion of Price-Anderson claims in tribal court. The panel majority (Judges Pregerson and Ferguson) concluded that, under *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), a non-Indian sued in tribal court must exhaust tribal remedies before seeking relief in federal court, save in very narrow circumstances. (App. 78a-81a) Quoting *National Farmers*, the court stated that the decisive issue was whether the Price-Anderson Amendments Act contained an "express jurisdictional prohibition" of tribal adjudication of nuclear-related claims. (App. 85a) Without directly challenging the holdings of other Circuits that Price-Anderson provides an exclusive federal *remedy* for nuclear-related torts, the court concluded that it need not reach the preemption issue because the Act did not expressly provide for exclusive federal court *jurisdiction*. (App. 86a) This Court's recent decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), which held that tribal exhaustion was not required with respect to matters over which a tribe plainly lacks regulatory jurisdiction (*id.* at 453 & 459-60 n.14), was distinguished in a footnote as limited to torts arising on reservation lands that had been transferred to state control and opened to the public. (App. 87a-88a n.5)

As for the district court's injunctions against assertion of Price-Anderson claims in tribal court, the Ninth Circuit majority acknowledged that the Neztsosies and Ms. Richards had not appealed those orders and were asserting only claims "based on Navajo common law and . . . not implicat[ing] Price-Anderson." (App. 81a) Nonetheless, the court of appeals *sua sponte* reversed the injunctions, citing "important comity considerations" and its view that Price-Anderson contained no express prohibition of tribal jurisdiction. (App. 82a)

Judge Kleinfeld dissented. He recited the holdings of other Circuits that the Price-Anderson Amendments Act provides an exclusive federal law remedy and preempts all other causes of action for nuclear-related torts. (App. 94a-95a, citing *In re TMI Litig. Cases Consol. II,* 940 F.2d 832, 854 (3d Cir. 1991) ("A claim growing out of any nuclear incident is compensable under the terms of the [Price-Anderson] Act or *it is not compensable at all.*" (emphasis in original)), and *O'Conner v. Commonwealth Edison Co.,* 13 F.3d 1090, 1099 (7th Cir. 1994) (same)). Judge Kleinfeld thus concluded that the tribal members' "claims for injury and death resulting from nuclear materials left over from uranium mining were Price-Anderson claims or nothing." (App. 94a)

It followed, Judge Kleinfeld reasoned, that the tribal court lacked jurisdiction over the tribal members' claims and that exhaustion was not required. Because the tribal members were limited to Price-Anderson remedies, had failed to appeal the district court's rulings that Price-Anderson claims could not be asserted in tribal court, and were asserting in tribal court only claims that had been preempted by federal law, "there are no claims that can be made in tribal court. There can be no claim for which exhaustion in tribal court can be required." (App. 95a)

SUMMARY OF ARGUMENT

I. In the Atomic Energy Act of 1954, Congress found that the development and control of nuclear materials were "vital to the common defense" and that federal regulation of such materials would promote the "national interest." 42 U.S.C. § 2012(a) & (c). Accordingly, Congress established an extensive program administered by the Atomic Energy Commission to regulate private-sector participation in the nuclear industry. Moreover, to supplement the AEC's licensing and regulatory controls, the Price-Anderson Amendments Act of 1988 added an additional feature to the AEA: an exclusive federal law remedial framework to govern all claims of injury alleged to be caused by nuclear-related activities in the United States.

Tribal law claims cannot survive this exclusive federal regime. Four Circuits have held without dissent that Congress intended the Price-Anderson regime to be the sole means by which nuclear-related torts may be adjudicated in the United States, and therefore that the Act preempts state law claims. For the same reason, tribal claims for nuclear-related torts are preempted. The statutory language declaring that all claims for nuclear torts must be Price-Anderson claims is unqualified, and the policy reasons that underlie that legislative decision are even more applicable to tribal claims than to state claims.

II. In light of the preemptive effect of Price-Anderson, requiring petitioners to exhaust tribal remedies makes no sense. The Ninth Circuit, in ruling to the contrary, gave no weight to the federal policy objectives of Price-Anderson, and failed to follow the teachings of *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Under *Strate*, a tribal court has no adjudicatory jurisdiction over matters that are beyond the tribe's regulatory jurisdiction. Indian tribes have no authority to regulate nuclear safety issues, because the federal government has exclusive jurisdiction of that subject under the Atomic Energy Act. On top of this, tribal tort law as applied to nuclear torts has now been preempted by Price-Anderson.

Accordingly, an exhaustion requirement in the present context would "serve no purpose other than delay." *Strate*, 520 U.S. at 459 n.14. Subjecting non-Indians to lengthy and futile tribal court proceedings for alleged nuclear torts undermines Price-Anderson's exclusive federal law remedy, is contrary to the prudential considerations that underlie this Court's exhaustion decisions, and would needlessly waste the resources of Indian claimants, the tribal court, and non-Indian litigants alike.

III. The Ninth Circuit also erred in reversing, *sua sponte*, the district court's orders that Price-Anderson claims should not be adjudicated in tribal courts. Because no appeal or cross-appeal had been taken from those orders, the court of appeals lacked jurisdiction to overrule them. In any event, the district court's orders were entirely correct. Price-Anderson's detailed federal regime for the uniform and equitable treatment of nuclear torts would be frustrated by tribal court adjudications.

ARGUMENT

I. Because the Atomic Energy Act and Price-Anderson Acts Provide the Exclusive Governing Law for Nuclear-Related Activities and Torts in the United States, Respondents' Tribal Law Claims Are Preempted.

The history of the Atomic Energy Act of 1954, including amendments from the Price-Anderson Act and Price-Anderson Amendments Act, shows one thing beyond doubt: Congress intended that federal law alone should govern health and safety issues relating to nuclear activities in the United States. More specifically, Congress ultimately concluded that federal law should provide the exclusive remedy for nuclear-related torts. Claims such as those of the Neztsosies and Ms. Richards are cognizable only under federal law, and claims based on any other body of law -- including tribal law -- are preempted.

A. The Atomic Energy Act of 1954

Comprehensive federal control over nuclear-related activities began with the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1946). At that time, Congress "contemplated that the development of nuclear power would be a Government monopoly." *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 63 (1978). Within just a few years, however, Congress modified its approach and sought to encourage private-sector participation. Congress concluded that "the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing."[4]

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[4] *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 207 (1983), *citing* H.R. Rep. No. 83-2181, at 1-11 (1954).

The Atomic Energy Act of 1954 (AEA)[5] implemented that new policy. Congress found that the "development, utilization, and control of atomic energy" for both military and civilian purposes "are vital to the common defense and security." 42 U.S.C. § 2012(a). Private industry should play a role in that development, but private activities must be "regulated in the national interest" (*id.* § 2012(c) & (d)) and, indeed, "regulated *by the United States* . . . to assure the common defense and security and to protect the health and safety of the public." *Id.* § 2012(e) (emphasis added). The AEA thus launched a comprehensive licensing and regulatory program, administered by the Atomic Energy Commission, to govern private conduct in the nuclear field, including the possession, transfer, and processing of source material, byproduct material, and special nuclear material. 42 U.S.C. §§ 2014(c), (e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114; *see* 10 C.F.R. ch. 1.[6]

Given the pervasive nature of AEA regulation and its close relationship to matters of national defense, this Court has consistently recognized that the federal government has "*exclusive* jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." *Pacific Gas & Elec.*, 461 U.S. at 207 (emphasis added). *See also*

[5]Ch. 1073, 68 Stat. 919 (1954), *codified as amended at* 42 U.S.C. §§ 2011-2297g-4.

[6]Uranium mining and milling involve both "source material," which includes uranium and uranium ore over certain minimum concentration levels (42 U.S.C. § 2014(z)), and "byproduct material," which includes tailings and wastes arising from the extraction or concentration of uranium ore processed for its source material content (*id.* § 2014(e)). Respondents' tribal court complaints also allege that petitioners' operations released plutonium, a "special nuclear material" under the AEA. *Id.* § 2014(aa).

By virtue of the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.*, the Nuclear Regulatory Commission and U.S. Department of Energy have now assumed the powers of the AEC under the Atomic Energy Act. *See Duke Power*, 438 U.S. at 63 n.1.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (the federal government has "*exclusive* regulatory authority over the safety aspects of nuclear power") (emphasis added). State regulation of the field was preempted: "Upon these subjects [health and safety regulation of nuclear-related activities], no role was left for the States." *Pacific Gas & Elec.*, 461 U.S. at 207.[7]

B. The Price-Anderson Act

One area where the states' role was initially left unaffected by the AEA was tort law. The AEA did not address that issue directly, and no federal remedy for nuclear torts was provided as an alternative to state or other non-federal law. This omission almost immediately became a subject of concern. During 1956 and 1957 hearings of the Joint Committee on Atomic Energy, private-sector representatives expressed their reluctance to enter the nuclear field because of the risks of large tort liability in the event of a major nuclear accident.[8] After assessing this testimony, the Joint Committee concluded that, despite the 1954 Act's objective to "encourage the entrance of private industry into the program, and [to] speed the further development of the peaceful uses of atomic energy, . . . the problem of liability

[7]As *Pacific Gas & Electric* indicated, however, AEA preemption did not extend to every aspect of state law affecting the nuclear industry. In *PG&E*, the Court upheld California's authority to regulate, as an economic matter, the decision whether a utility should build a nuclear plant. While "the Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation," the AEA expressly confirmed the states' traditional regulatory rule with respect to utility economic issues. 461 U.S. at 208-12, *citing* 42 U.S.C. §§ 2018 & 2021.

[8]*See Hearings before the Joint Committee on Atomic Energy on Governmental Indemnity for Private Licensees and AEC Contractors Against Reactor Hazards*, 84th Cong., 2d Sess. (1956); *Hearings before the Joint Committee on Atomic Energy on Governmental Indemnity and Reactor Safety*, 85th Cong., 1st Sess. (1957).

has become a major roadblock."[9]

Congress took its first step to address this liability issue in the Price-Anderson Act of 1957.[10] "The Act had the dual purpose of 'protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry.'" *Duke Power*, 438 U.S. at 64 (*quoting* 42 U.S.C. § 2012(i)). Amending the AEA, the statute established an AEC-supervised program of financial protection that both ensured the availability of funds for tort victims in the event of a nuclear accident, and also protected companies in the nuclear field against large-scale liability risks.[11] The statute mandated that the AEC apply this program to all its licensees engaged in the construction or operation of nuclear power plants; application of the program to the other AEC-regulated functions was left to agency determination.[12]

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[9]S. Rep. No. 85-296, at 1 (1957); H.R. Rep. No. 85-435, at 1 (1957). *See also Duke Power*, 438 U.S. at 64 ("spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation").

[10]Pub. L. No. 85-256, 71 Stat. 576 (1957), *codified as amended in, e.g.*, 42 U.S.C. §§ 2012(i), 2014(j)-(u) & 2210.

[11]Price-Anderson Act § 4, AEA § 170(a) & (d), *as amended*, 42 U.S.C. § 2210(a) & (d). The program consisted of (i) financial responsibility requirements for AEC licensees (mandatory private insurance or its equivalent), (ii) limitations on total damages, and (iii) governmental indemnification of damages in excess of insurance coverage.

[12]AEA § 170(d), 42 U.S.C. § 2210(d).

Price-Anderson financial protections are not limited, however, to parties who have indemnity agreements with the government. The phrase "person indemnified" under the Act is defined as "the person with whom an indemnity agreement is executed *and any other person who may be liable for public liability* [*i.e.*, for a nuclear-related tort]." Price-Anderson § 3, 71 Stat. 576, *as amended*, 42 U.S.C. § 2014(t). As one committee report explained:

(continued...)

While mitigating the risks of liability exposure, these initial Price-Anderson provisions did not alter the fact that non-federal law would be the underlying source of liability for nuclear torts. Indeed, "the right of the State courts to establish the liability of the persons involved in the normal way is maintained." S. Rep. No. 85-296, at 22. However, federal courts were authorized to enter supervisory orders that could affect actions pending in state courts, such as by declaring total liability for a nuclear accident to be limited, staying the payment of judgments, and apportioning payments among claimants. Price-Anderson § 4, 71 Stat. 578, *as amended*, 42 U.S.C. § 2210(o). Thus, a mixture of state law rights with an overlay of federal law protections and oversight was adopted. *See Duke Power*, 438 U.S. at 64-65, 82-94 (summarizing Price-Anderson provisions and upholding their constitutionality).

Prior to the major overhaul in 1988 that is the focus of the preemption issues presented here (*see* section C below), Congress fine-tuned the Price-Anderson Act on several occasions.[13] Amendments adopted in 1966, for example,

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[12](...continued)

> "Price-Anderson indemnity coverage has, from its inception, extended to any person who may be liable for public liability. This coverage was intentionally broad since the primary purpose of the legislation was to protect the public. As such, there is no reason to restrict coverage to those situations in which contractors or licensees of the [AEC] were the parties determined to be liable."

S. Rep. No. 87-1677, at 9 (1962) (report accompanying 1962 amendments to Price-Anderson Act). *See also* S. Rep. No. 85-296, at 17 (1957) (indemnities extend to all persons found liable for a nuclear tort). Given the status of the instant litigation, there has been no adjudication whether petitioners would have indemnification rights under Price-Anderson in the present circumstances.

[13]Pub. L. No. 87-615, 76 Stat. 409 (1962); Pub. L. No. 89-210, 79 Stat. 855 (1965); Pub. L. No. 89-645, 80 Stat. 891 (1966); Pub. L. No. 94-197, 89 Stat. 111 (1975).

required indemnified AEC licensees to waive certain state law tort defenses in the event of an "extraordinary nuclear occurrence,"[14] and provided for an absolute right of removal from state to federal court of suits arising from such occurrences.[15] Those amendments reflected a growing congressional concern that "state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions . . . was needed." *Duke Power*, 438 U.S. at 65.[16]

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[14]Pub. L. No. 89-645, § 3, 80 Stat. 891-92, 42 U.S.C. § 2210(n)(1). An "extraordinary nuclear occurrence" was defined as an event causing the discharge or dispersal of nuclear material in amounts that the AEC determined were "substantial" and likely to result in "substantial damages." *Id.* § 1, *as amended at* 42 U.S.C. § 2014(j).

[15]*Id.*, 80 Stat. 892, 42 U.S.C. § 2210(o) & (n)(1). *See* S. Rep. No. 89-1605, at 15 (1966):

> "The absolute right of removal is important because it provides a mechanism for bringing before the same court all cases arising from the same set of circumstances -- circumstance with which the court would become thoroughly familiar. Claimants and defendants would become acquainted with the approach taken by the court, the taking of depositions, and other evidentiary problems would be simplified, and this would seem to be a deterrent to an excess number of cases actually going to trial. The end result, it is believed, would be more expeditious and uniform treatment of all parties."

As discussed at pp. 18-19 *infra*, Congress later extended this absolute right of removal to all nuclear-related tort claims.

[16]*See also id.* at 89:

> "The legislative history of the liability-limitation provisions and the accompanying compensation mechanism [of the initial Price-Anderson Act and its early amendments] reflects Congress' determination that reliance on state tort law remedies and state-court procedures was an unsatisfactory approach to

(continued...)

Nonetheless, at least for the time being, state law continued to govern nuclear torts, notwithstanding potential conflicts between state tort rules and federal safety standards. This Court thus concluded in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), that the Price-Anderson Act did not preempt state law claims for punitive damages arising from a nuclear accident. Although there was some "tension" between state tort rules and federal regulation of safety standards, Congress was seen to have made an election against tort law preemption:

> "In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less." *Id.* at 256.[17]

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[16](...continued)
assuring public compensation for nuclear accidents, while at the same time providing the necessary incentives for private development of nuclear-produced energy."

[17]Justice Powell dissented in *Silkwood*, in an opinion joined by Chief Justice Burger and Justices Marshall and Blackmun:

> "Striking the balance between the need to promote nuclear development and the responsibility to insure public safety is a task that requires a unique level of professional expertise.

(continued...)

C. The Price-Anderson Amendments Act of 1988

The deference to state law fundamentally changed with the Price-Anderson Amendments Act of 1988.[18] In addition to concern over the *Silkwood* ruling, Congress had seen the aftermath of the Three Mile Island (TMI) nuclear incident in 1979. That incident resulted in over 150 separate lawsuits in various state and federal courts, with more than 3,000 claimants and multiple defendants. Yet, because the NRC had determined that TMI was not an "extraordinary nuclear occurrence" under the terms of Price-Anderson's 1966 amendments, the suits proceeded in multiple courts without consolidation or coordination. *See* S. Rep. No. 100-218, at 13 (1987); *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986) (federal courts lacked subject matter jurisdiction over TMI claims because of the absence of an "extraordinary nuclear occurrence"). Attorneys representing both plaintiffs and defendants testified to Congress about the inefficiencies and potential inequities of such a system. *See* S. Rep. No. 100-218, at 13.

Accordingly, Congress concluded that Price-Anderson needed to be "substantially modified in a manner that will better achieve the goal of providing in advance of any nuclear

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[17](...continued)
Congress has enacted detailed legislation and created a highly qualified administrative agency to promulgate and enforce regulations. Those regulations constitute a uniform body of law carefully designed to balance safety and efficiency in nuclear facilities across the country."

464 U.S. at 282. Thus, in the dissenters' view, state law allowance of punitive damages was preempted. The effectiveness of AEA regulation was seen to "require[] that nuclear policy and regulation be insulated from ad hoc, uninformed and perhaps biased decisionmaking." *Id.*

[18]Pub. L. No. 100-408, 102 Stat. 1066 (1988). "With the Amendments Act . . ., the entire Price-Anderson landscape was transformed." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991).

incident a mechanism for full compensation of the public that is equitable, efficient, reliable, and comprehensive." S. Rep. No. 100-218, at 4 (1987). In the words of the House Report, there was a need for "equitable and uniform treatment of victims of a nuclear accident." H.R. Rep. No. 100-104, pt. 1, at 18 (1987). The 1988 Amendments Act sought to achieve that result, as follows:

First, the 1988 Amendments federalized the law of nuclear torts by "creat[ing] a federal cause of action which did not exist prior to the Act." *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 856 (3d Cir. 1991). This new cause of action was called a "public liability action" and was defined to mean "any suit asserting public liability."[19] The term "public liability," incorporated from the original 1957 Price-Anderson Act, was defined as "*any legal liability* arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w) (emphasis added). In turn, "nuclear incident," also dating from the 1957 Act, was defined broadly to include

> "*any occurrence* . . . within the United States *causing*, within or outside the United States, *bodily injury*, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or *resulting from* the radioactive, toxic, explosive, or other hazardous properties of *source*, special nuclear, or *byproduct material* . . . ."

Id. § 2014(q) (emphasis added).[20]

Without doubt, the "public liability action" created by the 1988 Amendments is a *federal* cause of action, arising under

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[19]1988 Amendments Act § 11(b), 102 Stat. 1076, *codified at* 42 U.S.C. § 2014(hh).

[20]*See* S. Rep. No. 85-296, at 17 ("The definition of 'nuclear incident' is designed to protect the public against any form of damage arising from the special dangerous properties of the materials used in the atomic energy program.").

the Price-Anderson Act as then amended. The statute was explicit on this point: "A public liability action *shall be deemed to be an action arising under section 2210 of this title* [the Price-Anderson Act] . . . ."[21] Further, the United States district court in the district where a nuclear incident occurred was given original jurisdiction over any public liability action that arose, without regard to the citizenship of parties or the amount in controversy.[22] In the words of the House Report, the Act "expressly states that any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, thereby making such suits asserting public liability 'Cases . . . arising under . . . the Laws of the United States' within the meaning of Article III." H. R. Rep. No. 100-104, pt. 1, at 18.[23]

Second, to further assure the availability of a federal forum, Congress eliminated the bifurcated approach of the 1966 amendments, which had allowed for removal from state to federal court only of tort claims arising from an "extraordinary nuclear occurrence."[24] As experience from Three Mile Island had shown, "[t]he need for consolidation of

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[21]1988 Amendments Act § 11(b), 102 Stat. 1076, 42 U.S.C. § 2014(hh) (emphasis added).

[22]1988 Amendments Act § 11(a), 102 Stat. 1076, *amending* 42 U.S.C. § 2210(n)(2). Prior to this amendment, § 2210(n)(2) provided a basis for federal jurisdiction only for suits that involved an "extraordinary nuclear occurrence," which in turn would typically involve Price-Anderson's financial protection program.

[23]*See O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090, 1100 (7th Cir. 1994) (Congress had a "manifest intent to create a new and entirely federal cause of action"); *In re TMI Cases*, 940 F.2d at 851-60 (by virtue of the 1988 Amendments Act, public liability claims are federal causes of action and thus properly within the federal courts' Article III jurisdiction of claims based on federal law).

[24]1988 Amendments Act § 11(a), 102 Stat. 1076, *amending* 42 U.S.C. § 2210(n)(2).

claims to ensure equitable and uniform treatment of victims and the orderly distribution of funds is just as great whether the claims arise from a nuclear incident that ultimately is deemed not to be an extraordinary nuclear occurrence or from an incident that is." H.R. Rep. No. 100-104, pt. 1, at 18. Thus, any public liability action filed in state court is now automatically removed to federal court at the defendant's request, or at the request of the NRC or Department of Energy.[25] This guarantees, *inter alia*, the effectiveness of Price-Anderson provisions designed to ensure that related nuclear claims can be addressed in a uniform and coordinated fashion and ensures that federal court jurisdiction may extend to the federal law cause of action prescribed by the Amendments.[26]

Third, Congress returned to the issue of punitive damages. The 1988 Amendments partially overturned the *Silkwood* decision by precluding an award of punitive damages against any person with an indemnification agreement with the United States.[27] Congress explained that this action "reflects the longstanding policy that the Federal government should not be liable for punitive damages." S. Rep. No. 100-218, at 12.

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[25]42 U.S.C. § 2210(n)(2).

[26]*See, e.g.*, 42 U.S.C. § 2210(n)(3)(A) (chief judge of U.S. district court hearing nuclear-related claims may appoint a special caseload management panel to coordinate cases); *id.* § 2210(n)(3)(C) (panel may consolidate related claims for trial, appoint special masters to hear elements of the cases, adopt special rules to allow for more equitable consideration of claims, and implement such other measures "as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident").

[27]§ 14, 102 Stat. 1078, *codified at* 42 U.S.C. § 2210(s). *See* S. Rep. No. 100-218, at 12.

The Price-Anderson Amendments Act thus advanced the original dual goals of the 1954 AEA and the 1957 Price-Anderson Act to protect public safety and to ensure private-sector participation in the nuclear industry by limiting unreasonable and unpredictable legal risks.[28] A federal cause of action was created for nuclear torts, subject to federal court jurisdiction and to the various financial and procedural safeguards of Price-Anderson and its progeny. As we now show, permitting tribal law claims for nuclear torts would be inconsistent with both the letter and intent of Price-Anderson as overhauled by Congress in 1988.

D. Preemption Under the Amendments Act

Price-Anderson as amended in 1988 established a federal law "public liability action" that Congress defined as "*any* suit asserting public liability." 42 U.S.C. § 2014(hh). "[P]ublic liability" meant "*any* legal liability arising out of or resulting from a nuclear incident." *Id.* § 2014(w). Congress defined a "nuclear incident" as "*any* occurrence" that caused injuries or death from nuclear materials. *Id.* § 2014(q).[29] The new action was to apply to all nuclear incidents, whether "occurring before, on, or after the date of the enactment of [the 1988 Amendments]."[30] Clearly, Congress purposely

[28]*See Pacific Gas & Elec.*, 461 U.S. at 207 (the AEA "grew out of Congress' determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing"); *Duke Power*, 438 U.S. at 64 (Price-Anderson Act of 1957 addressed concerns that private firms might refuse to operate nuclear-related facilities "if their liability were not limited by appropriate legislation").

[29]Emphasis added in each instance.

[30]1988 Amendments Act § 20(b)(1), 102 Stat. 1084.

chose this language to be sweepingly inclusive.[31]

Not surprisingly, every court of appeals that has addressed the issue has held that Price-Anderson as now amended establishes an exclusive federal remedy for nuclear-related torts, preempting any other theories of liability. *See In re TMI Litig. Case Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) ("A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*"; state law claims preempted (emphasis in original)); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997) ("Nieman can sue under the Price-Anderson Act, as amended, or not at all"; state law claims preempted); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994) ("state regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law"); *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305 (11th Cir. 1998) (endorsing *TMI*, *Nieman*, and *O'Connor* and holding state law claims to be preempted), *petition for cert. filed* (U.S. Oct. 17, 1998) (No. 98-640). Each of these cases held that federal standards defined the duty of care by which a defendant's conduct should be judged in a public liability action; any differing state tort or regulatory standard was preempted.[32]

[31]*See* S. Rep. No. 100-218, at 13 ("Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act"); H.R. Rep. No. 100-104, pt. 1, at 18 (the act "expressly states that any suit asserting public liability shall be deemed to be an action under the Price-Anderson Act").

[32]The Tenth Circuit, in the only case other than the present one to address whether Price-Anderson preempts tribal law claims, likewise found preemption. *See Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) ("The PAA [Price-Anderson Act] on its face provides the sole remedy for the torts alleged in this case [claims under tribal law]."). Inexplicably, though, *Farley* required exhaustion of the preempted tribal remedies. In that respect, the Tenth Circuit committed the same error as the Ninth Circuit below.

These decisions are clearly correct, because Price-Anderson forecloses all claims for nuclear liability not expressly sanctioned by the Act. Indeed, the case for preemption of tribal claims is even stronger than for state law claims. This is because the 1988 Price-Anderson Amendments, while establishing an exclusive federal cause of action, provide that "the substantive rules for decision in [a public liability] action *shall be derived from the law of the State* in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [Price-Anderson]." 42 U.S.C. § 2014(hh) (emphasis added). This limited borrowing of state law does not undermine the federal nature of a Price-Anderson public liability action, and the lower courts have consistently so held.[33] But, the fact that state law is borrowed for some purposes, with no provision for application of tribal law, unambiguously refutes the argument that there is any role for tribal law in the field of nuclear torts.[34]

Moreover, tribal law claims -- particularly if litigated in tribal courts -- raise all the same problems that existed under state law regimes prior to Price-Anderson, and more: broad and unpredictable standards of care,[35] the inability to

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[33]*See, e.g., In re TMI Cases*, 940 F.2d at 855 ("state law provides the content of and operates *as federal law*"; thus, the actions are federal law in nature) (emphasis added); *O'Connor*, 13 F.3d at 1100; *Roberts v. FPL*, 146 F.3d 1305. *See also* pp. 17-18 *supra*.

[34]Price-Anderson's borrowing "from the law of the *State*" in which the nuclear incident occurs (42 U.S.C. § 2014(hh); emphasis added) cannot reasonably be read as a reference to tribal law, and respondents have never argued that it can.

[35]For example, respondents' tribal court complaints both contain a count for "outrageous conduct," wherein they allege that petitioners' conduct was

> "so outrageous in character and so extreme in degree as to compel a reasonable person in the Navajo community to declare

(continued...)

consolidate and coordinate related actions,[36] the absence of procedures to include the United States as a party,[37] the absence of financial-protection provisions for large nuclear

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[35](...continued)

> the same as atrocious, beyond all bounds of decency, and utterly intolerable in a civilized Navajo community."

(App. 25a & 57a) If permissible, this claim would obviously give broad discretion to a Navajo jury to apply unique local rules in deciding petitioners' liability. In a "public liability action" under Price-Anderson, by contrast, federal regulatory standards set the relevant standard of care. *In re TMI Cases*, 940 F.2d at 859; *O'Connor*, 13 F.3d at 1103-05; *Roberts v. FPL*, 146 F.3d at 1308.

[36]For example, the preservation of tribal claims in tribal courts would serve to deny the many procedural innovations intended by Congress: federal removal rights at the option of any party (42 U.S.C. § 2210(n)(2)), a caseload management panel appointed by the federal court (*id.* § 2210(n)(3)), and the ability of the NRC or Department of Energy to require consolidation of related claims (§ 2210(n)(2)).

[37]The sovereign immunity of the United States forecloses its being sued in tribal court (*e.g., United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986)), and the United States has consistently refused to waive that immunity and to appear voluntarily in tribal litigation. For example, in the pending tribal court proceeding against Cyprus, Cyprus had sought to interplead the United States as a third-party defendant, noting that all the mining and milling operations had been conducted under AEC contracts for the benefit and under the supervision of the United States. Upon notice from the United States that it would not appear in tribal court, the third-party complaint was not allowed, and Cyprus' motion to dismiss for absence of a necessary party was denied. *See* Order Denying Motion To Dismiss, No. KY-CV-002-95 (D.C. Navajo Nation Judicial District of Kayenta, Arizona, May 20, 1997).

Price-Anderson contemplates that the United States can "take charge" of a public liability action in which it is likely to face an indemnity obligation, by appearing in the suit and by settling or defending the claims on its own initiative. 42 U.S.C. § 2210(h). How such a provision could operate in the context of tribal court litigation is wholly untested.

accidents,[38] and -- to quote Justice Powell on the adjudication of nuclear torts under state law systems -- the risk of "ad hoc, uninformed and perhaps biased decision-making."[39] Additionally, the availability of federal constitutional protections in tribal court, such as due process limitations on punitive damage awards, is unclear.[40] Thus, the litigation of nuclear torts as tribal claims and in tribal courts is at odds with both the language and objectives of Price-Anderson.

The application of Price-Anderson to foreclose respondents' tribal law claims does not intrude on any protected tribal rights to self-governance. As the Court said in *South Dakota v. Bourland*:

> "Although Indian tribes retain inherent authority to

[38]*See, e.g.*, 42 U.S.C. § 2210(a)-(e), (i), (o)-(s).

[39]*Silkwood v. Kerr-McGee*, 464 U.S. at 282 (dissenting). The Price-Anderson Amendments recognize that radiation tort cases are uncommonly complex and present unusually difficult issues of scientific and medical evidence. *See, e.g., In re Hanford Nuclear Reservation Litigation*, 1998 WL 775340 (E.D. Wash. Aug. 21, 1998) (762-page opinion dealing with radiation claims on summary judgment); *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984) (225-page opinion devoted largely to discussion of the biophysics involved in a radiation tort), *rev'd*, 816 F.2d 1417 (10th Cir. 1987). The gatekeeping role which a federal judge would apply under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is thus vitally important.

[40]*See BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The Indian Civil Rights Act of 1968 (ICRA) specifies that an Indian tribe, in exercising its powers of self-governance, shall not deprive any person of liberty or property without due process of law. 25 U.S.C. § 1302(8). The mechanism to secure federal court enforcement of that statute is, however, in doubt. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (except by writ of habeas corpus, ICRA does not authorize an original federal action against tribal governmental action alleged to violate ICRA protections). Moreover, the Navajo supreme court has concluded that ICRA is likely unconstitutional under *United States v. Lopez*, 514 U.S. 549 (1995), and has thus declined to apply it. *Rough Rock Community School v. Navajo Nation*, SC-CV-06-94 (1996).

> punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'"

508 U.S. 679, 694-95 (1993), *quoting Montana v. United States*, 450 U.S. 544, 564 (1981) (citation omitted). In any event, Congress has plenary power to regulate commerce with the Indian tribes (U.S. Const. art. I, § 8, cl. 3), and "all aspects of Indian sovereignty are subject to defeasance by Congress."[41] Nor does preemption of tribal law require an explicit reference to tribes; "it is now well settled . . . that a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).[42]

[41]*Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984). *See also, e.g., South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 798 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.").

[42]*See also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996) ("tribal power, even regarding exclusively internal conflicts, may be limited by treaty or federal statute, . . . including statutes that are silent as to Indians"); *Lazore v. C.I.R.*, 11 F.3d 1180, 1188 (3d Cir. 1993) (rejecting Indian's claim to tax exemption based on "the since-discredited rule that general acts do not apply to Indians in the absence of a clear Congressional intent to the contrary"); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (ERISA applies to tribal entities notwithstanding absence of explicit congressional directive); *U.S. Dep't of Labor v. OSHRC*, 935 F.2d 182 (9th Cir. 1991) (OSHA applies to tribal entities notwithstanding absence of explicit congressional directive); *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (RCRA's provision that "[a]ny action" be brought in federal court precludes tribal court jurisdiction and obviates any exhaustion requirement).

Price-Anderson's inclusion of "*any* suit" for "*any* legal liability" arising from "*any* occurrence" of nuclear injury (42 U.S.C. § 2014(w), (q), (hh) (emphasis added)) is plainly sufficient to encompass tribal law claims for nuclear torts.

Accordingly, just as Price-Anderson has preempted state law with respect to nuclear-related torts, it has also preempted tribal law. Respondents' claims of injuries from radioactive or toxic properties of uranium ore and mill wastes and tailings are public liability actions under the terms of Price-Anderson, for they are personal injury claims arising from a "nuclear incident."[43] Respondents must therefore look to federal law, and not to state or tribal law, for relief.

II. The Doctrine of Exhaustion of Tribal Remedies Does Not Require the Wasteful Exhaustion of Preempted Tribal Law Claims.

Notwithstanding the compelling case for Price-Anderson preemption, the Ninth Circuit declined to address the issue, ruling instead that El Paso and Cyprus had to exhaust tribal remedies. This mechanical application of the tribal exhaustion doctrine disregards the important federal interests that caused Congress to adopt Price-Anderson and, indeed, paradoxically requires recourse to tribal claims and remedies that -- by virtue of federal law -- do not in fact exist. And, in making its rulings, the Ninth Circuit failed to follow this Court's most recent decision on the tribal exhaustion doctrine, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

A. The Tribal Exhaustion Doctrine

The doctrine of tribal court exhaustion derives from *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*,

[43]42 U.S.C. § 2014(q). It is well-understood that a "nuclear incident" may be either a sudden event, or may occur over a long period of time from exposure to radioactive material. *See* S. Rep. No. 85-296, at 16 (1957).

471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). *National Farmers* involved a personal injury action filed in tribal court on behalf of a Crow Indian against a state-chartered school district. The school district and its insurer brought a federal court action to enjoin the tribal proceeding, and this Court concluded that the district court had jurisdiction under 28 U.S.C. § 1331 to hear the school district's claim that the tribal court was exceeding its jurisdiction as defined by federal Indian law. However, "[f]inding no cause for immediate federal-court intervention" (*Strate*, 520 U.S. at 449), the Court ordered that the federal district court should either stay its hand, or dismiss the federal action without prejudice, until the tribal court first had an opportunity to consider the question of its own jurisdiction. 471 U.S. at 852-53. The Court noted, however, that tribal exhaustion was not an inflexible requirement in all settings.[44]

Iowa Mutual also involved a personal injury action initially brought in tribal court. The claimants were tribal members, and the defendants included tribal members, a company owned by those members, and the defendants' insurer. The insurer then initiated a diversity action in federal court, claiming simply an absence of an obligation to defend. (No federal law challenge to tribal jurisdiction was asserted.) This Court held that diversity jurisdiction in the district court was proper, but once again the Court instructed the district court to consider staying its hand pending the exhaustion of tribal remedies. Citing the "analogous" federal/state absten-

[44]The Court provided three examples of situations where exhaustion should not be required:

> "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."

Id. at 856 n.21 (citation omitted). As *Strate* has made clear, this is not a complete list of exceptions to the exhaustion doctrine. *See* pp. 30-31 *infra*.

tion doctrine in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Court held that exhaustion of tribal remedies should be required where "strong federal policy concerns favored resolution in the nonfederal forum." 480 U.S. at 16 n.8. Stating that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," the Court observed that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18.[45] "In the absence of any indication" that Congress intended to abrogate tribal jurisdiction over the reservation dispute in question (*id.*), exhaustion should be required.

National Farmers and *Iowa Mutual* both made clear that the tribal exhaustion doctrine was "prudential" rather than jurisdictional in nature (*Iowa Mutual*, 480 U.S. at 16 n.8 & 20 n.14) and was subject to exceptions (*National Farmers*, 471 U.S. at 856 n.21). Yet, some lower courts have imposed the doctrine in a mechanical and rigid fashion. For example, in *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1408 (9th Cir. 1991), the Ninth Circuit held that "there is no discretion not to defer" to tribal court, even though the deferral request came on the eve of trial in federal court and years after the Native American plaintiffs in that case had themselves elected a non-tribal forum.

Likewise, in this case the Ninth Circuit focused almost exclusively on the phrase "patently violative of express jurisdictional prohibitions," one of the exceptions to the exhaustion doctrine identified in *National Farmers* (note 44 *supra*). Concluding that Price-Anderson contained no such "express jurisdictional prohibition," the court ordered exhaustion without considering whether Price-Anderson provided an express *substantive* bar to respondents' claims or

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[45]In *Strate*, the Court explained that such presumptive tribal jurisdiction was limited to matters over which the tribe had regulatory authority. *See* p. 30 *infra*.

whether, in the context of nuclear torts, "strong federal policy concerns favored resolution in the *nonfederal* forum." *Iowa Mutual*, 480 U.S. at 16 n.8 (emphasis added). And, in ordering exhaustion, the court brushed aside arguments that deferring consideration of the threshold preemption issue would serve no useful purpose, would result in enormous expense and delay for both sides, and would frustrate Price-Anderson's objective of uniform and efficient federal-law treatment of nuclear torts.

B. The Teaching of *Strate*

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), this Court clarified the law of tribal exhaustion in important respects, but its message went unheeded by the Ninth Circuit.

Strate involved a vehicular accident on a state highway traversing a federal Indian reservation. The state maintained and controlled the highway pursuant to a federal right-of-way grant. Complaining parties, some of whom were tribal members and some not, sued non-members in tribal court, and those defendants then counter-sued in federal court, claiming a lack of tribal jurisdiction by virtue of the right-of-way grant. In a unanimous opinion, this Court held that the tribal court lacked jurisdiction. The Court thus affirmed the court of appeals, which had reversed the district court's ruling that the tribal court had jurisdiction under *National Farmers* and *Iowa Mutual*. The Court held that, under the principles set forth in *Montana v. United States*, 450 U.S. 544 (1981), and other cases that define the limits of tribal authority over non-members, the tribe lacked regulatory jurisdiction within the state highway right-of-way, and as a result lacked adjudicatory jurisdiction over the non-member litigants.

Strate established three important principles:

First, the decision clarifies that the tribal court exhaustion doctrine of *National Farmers* and *Iowa Mutual* does not expand a tribe's jurisdiction over non-members beyond the limitations set forth in *Montana* and its progeny. That is, *Montana*'s "general proposition" that a tribe's inherent

sovereign powers "do not extend to the activities of non-members of the tribe" (450 U.S. at 565) is equally true for adjudicatory jurisdiction and regulatory jurisdiction. *National Farmers* and *Iowa Mutual* do not modify the *Montana* rules that limit tribal authority over non-members. *Strate*, 520 U.S. at 448.

Second, *Strate* unequivocally held that tribal court jurisdiction cannot exist where tribal regulatory jurisdiction is absent: "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.* at 453. The Court thus clarified the statement in *Iowa Mutual* that, with respect to "the activities of non-Indians on reservation lands," civil jurisdiction "presumptively lies in the tribal courts" (480 U.S. at 18). What was meant, *Strate* explained, was the "unremarkable" proposition that a tribe may have adjudicatory jurisdiction "where tribes possess *authority to regulate* the activities of non-members," which is sometimes (but certainly not always) the case with respect to on-reservation activities. *Strate*, 520 U.S. at 453 (emphasis added).

Third, *Strate* explained that tribal exhaustion was a principle "based on comity," "prudential" in nature, and "not an unyielding requirement." *Id.* at 449 n.7 & 453. Thus, exhaustion should not be blindly required where it will serve no useful purpose. *National Farmers* and *Iowa Mutual* noted that development of a full record in tribal court may be desirable not simply as an exercise of courtesy, but because the tribal court's findings of fact and conclusions on tribal law may inform the federal court on the issue of tribal jurisdiction.[46] In *Strate*, the Court recognized the other side of the same coin: that it may be clear at the outset that the tribe lacks jurisdiction and that its expertise on tribal law is of

[46]*See National Farmers*, 471 U.S. at 856-57 (exhaustion in the tribal courts will give federal courts "the benefit of their expertise"); *Iowa Mutual*, 480 U.S. at 16 ("tribal courts are best qualified to interpret and apply tribal law").

no moment, even in the absence of an "express jurisdictional prohibition" from Congress.

Thus, *Strate* concluded that, if it is "plain" that a tribe lacks jurisdiction to regulate a non-member's conduct, "it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." *Id.* at 459 n.14. "Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, *the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay*." *Id.* (internal citation omitted) (emphasis added). Indeed, requiring exhaustion when the tribe lacks adjudicatory authority would serve only to waste the parties' resources and to burden needlessly the tribal judicial system.[47]

C. The Application of *Strate* in the Context of Price-Anderson Claims

Under the analysis required by *Strate*, a critical threshold issue on the propriety of tribal court jurisdiction over a non-member is whether the tribe has regulatory jurisdiction with respect to the matters at issue. Where it is clear that

[47]This functional analysis is consistent with the approach to exhaustion applied in other contexts, where the lower courts are to balance the interests in prompt access to a judicial forum with countervailing interests that may support exhaustion of other remedies. *E.g.*, *Reiter v. Cooper*, 507 U.S. 258, 268-70 (1993) (exhaustion not required where agency lacked power to grant the requested relief); *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) ("application of the exhaustion doctrine is 'intensely practical'"), *quoting Mathews v. Eldrige*, 424 U.S. 319, 331 n.11 (1976); *McKart v. United States*, 395 U.S. 185, 198 (1969) (exhaustion not required where only issue was one of statutory construction that did not require agency expertise). Similarly, the rule in the analogous area of federal/state abstention (*Iowa Mutual*, 480 U.S. at 16 n.8) is that a federal court will not defer to state proceedings where issues of federal law are predominant. *E.g.*, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). Here, the Ninth Circuit failed even to consider the strong federal interest manifest in Price-Anderson in assuring the availability of a federal forum.

regulatory authority over non-members is vested elsewhere -- whether it be the state or federal government -- tribal adjudicatory jurisdiction is plainly lacking, and tribal remedies need not be exhausted. Here, because Congress has given the federal government exclusive regulatory authority over nuclear activities, exhaustion is not required.

The Court's cases recognize a variety of ways by which tribal regulatory power may be divested or diminished. For example, regulatory jurisdiction may be lacking because the dispute arose on lands over which the tribe lacks territorial sovereignty. In *Strate*, tribal jurisdiction was lacking because the federal government had granted a right-of-way across reservation trust lands to state authorities for a state highway. In *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408 (1989), it was because portions of the reservation had been opened to predominantly non-Indian fee ownership. In *South Dakota v. Bourland*, 508 U.S. 679 (1993), it was because Congress had authorized non-Indian recreational use and Army Corps of Engineers regulatory control over certain reservation lands. In each instance, the tribe's regulatory jurisdiction over non-members' activities on specified lands was held to have been abrogated or diminished.

In other instances, tribal jurisdiction over non-members may be absent for reasons unrelated to particular land status. For example, because of the "inherent limitations on tribal powers that stem from their incorporation into the United States," tribes lack criminal jurisdiction over non-members, at least in the absence of express congressional authorization. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978); *see also Duro v. Reina*, 495 U.S. 693 (1990).[48] Similarly, by statute Congress may assign civil regulatory

[48]*Duro v. Reina* held that inherent tribal powers did not include criminal jurisdiction over a non-member *Indian*. Congress subsequently granted that authority by affirmative legislation. Pub. L. No. 101-511, § 8077(c), 104 Stat. 1892 (1991), *amending* 25 U.S.C. § 1301(2).

jurisdiction in a manner that is inconsistent with assertions of tribal jurisdiction.[49] That has occurred in the case of nuclear activities, where exclusive jurisdiction clearly lies with the federal government by virtue of the Atomic Energy Act and its Price-Anderson amendments. *E.g., Pacific Gas & Elec.*, 461 U.S. at 207; *Silkwood v. Kerr-McGee*, 464 U.S. at 248.

Accordingly, exhaustion of tribal remedies should not be required in this case. The arguments of El Paso and Cyprus that the AEA and Price-Anderson preempt tribal causes of action and thus bar jurisdiction over tribal law claims present issues solely of federal law, not issues of fact or tribal law. There is nothing the tribal courts can say or do that will clarify or elucidate those issues, even if long years of complex and costly litigation are endured. As in *Strate*, exhaustion "would serve no purpose other than delay." 520 U.S. at 460 n.14. Moreover, an exhaustion requirement would undermine both the objectives and the logic of the congressional act of preemption: to secure uniform and efficient disposition of nuclear claims under a federal law regime.

* * * *

For these reasons, the Court should hold that exhaustion of tribal remedies is inappropriate in this case, and that respondents' tribal law claims for nuclear torts have been preempted by federal law. Indeed, preemption here has rendered the tribal remedies a nullity -- there are simply no such remedies to exhaust. The appropriate recourse for respondents' alleged injuries is a Price-Anderson claim filed in federal court.

[49]*See, e.g., Northern States Power Co. v. Prairie Island Mdewakenton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993) (tribal ordinance regulating transportation of hazardous materials across reservation lands was preempted by federal Hazardous Materials Transportation Act); *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (federal Resource Conservation and Recovery Act preempts tribal authority over hazardous waste site).

III. The Ninth Circuit Improperly Reversed the District Court's Injunctive Orders from Which No Appeal Had Been Taken.

Neither the Neztsosies nor Ms. Richards pleaded any Price-Anderson claims in their tribal court complaints. Their suits rest entirely on tribal law. The district court, however, entered preliminary injunctive orders that prohibited them from adding Price-Anderson claims in the tribal proceedings. Respondents did not appeal from those orders, or cross-appeal when El Paso and Cyprus noticed their respective appeals from the district court's refusal to enjoin the tribal law claims. Notwithstanding these facts, the Ninth Circuit *sua sponte* asserted jurisdiction over the injunctive orders and reversed, citing "important comity considerations involved" in the relationship of the federal courts and the Navajo tribal courts. (App. 81a-82a)

The Ninth Circuit was clearly in error. Uniform controlling authority has held that an appellee who fails to cross appeal from a trial court order may not attack that order with a view to enlarging his or her rights or reducing the rights of the opposing party. *E.g.*, *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191-93 (1937) (appellate court may not "give a new measure of relief" to appellee); *Miller v. Butcher Distribs.*, 89 F.3d 265, 267 (5th Cir. 1996); *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 441 (7th Cir. 1992). Likewise, "[a] cross-petition is *required* . . . when the respondent seeks to alter the judgment below." *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 364 (1994) (emphasis added). *See also Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (courts may not waive the jurisdictional requirements of Federal Rules of Appellate Procedure 3 and 4).

The only authority cited by the Ninth Circuit for its "comity" exception to this jurisdictional rule was *Stone v. City & County of San Francisco*, 968 F.2d 850 (9th Cir. 1992). *Stone*, however, dealt with the very different question of whether an appellate court was entitled to consider a new *legal*

argument, not raised by the parties, to vacate an order that appellants had properly brought within the appellate court's jurisdiction. *See id.* at 855. Here, by contrast, the Ninth Circuit exceeded its jurisdiction by overturning orders that were not before it.[50]

In any event, even if this Court were to conclude that the Ninth Circuit did not exceed its jurisdiction, the district court orders were plainly correct. There is absolutely no indication that Congress intended to authorize tribal courts to adjudicate the federal law causes of action established by the 1988 Price-Anderson Amendments. To the contrary, the 1988 Amendments were written to ensure federal court jurisdiction at the request of any party to the action or at the request of either the NRC or Department of Energy. Congress thus provided for original federal court jurisdiction for any public liability action (42 U.S.C. § 2210(n)(2)), for removal of actions pending in state courts at the request of any party or the NRC or Department of Energy (*id.*), and for special federal court caseload management panels to supervise related cases (*id.* § 2210(n)(3)). These provisions and the broader congressional objective of "equitable and uniform treatment of victims of a nuclear accident" (H.R. Rep. No. 100-104, pt. 1, at 18) would be frustrated by granting tribal courts the authority to exercise jurisdiction over Price-Anderson claims.

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[50]It should be noted that this Court has not engaged in the practice of *sua sponte* raising tribal exhaustion questions where the issue was not properly preserved and presented. *E.g.*, *Alaska v. Native Village of Venetie*, 118 S. Ct. 948 (1998); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408 (1989).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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